

HON. THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE
and WASTE ACTION PROJECT,

Plaintiffs,

v.

ARDAGH GLASS INC.,

Defendant.

C20-284 TSZ

CONSENT DECREE

I. STIPULATIONS

WHEREAS, Plaintiffs Puget Soundkeeper Alliance (“Soundkeeper”) and Waste Action Project (“WAP”) filed a complaint against Defendant Ardagh Glass, Inc. (“Ardagh”) alleging violations of the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, relating to discharges of stormwater associated with industrial activities and other pollutants from Ardagh’s facility, located at 5801 E Marginal Way S, Seattle, Washington 98134 (the “Facility”) and seeking declaratory and injunctive relief, civil penalties, and attorneys’ fees and costs.

WHEREAS, Soundkeeper, WAP, and Ardagh all agree that settlement of these matters is in the best interest of the parties and the public, and that entry of this Consent Decree is the most appropriate means of resolving this action.

WHEREAS, Soundkeeper, WAP, and Ardagh stipulate to the entry of this Consent Decree without trial or adjudication of any issues of fact or law regarding Plaintiffs’ claims and without any stipulations other than those expressly provided in this Consent Decree.

1 DATED this 21st day of July, 2021

2 NOSSAMAN LLP

3 By s/ Svend Brandt-Erichsen
4 Svend Brandt-Erichsen, WSBA No. 23923
5 Attorneys for Defendant
6 Ardagh Glass, Inc.

SMITH & LOWNEY PLLC

By s/ Meredith A. Crafton
Meredith A. Crafton, WSBA #46558
Richard A. Smith, WSBA #21788
Attorneys for Plaintiffs
Puget Soundkeeper Alliance and
Waste Action Project

7 ARDAGH GLASS INC.

8 By [Signature]
9 Joshua R. Markus
General Counsel and Vice President

PUGET SOUNDKEEPER ALLIANCE

By [Signature]
Sean Dixon
Executive Director

WASTE ACTION PROJECT

10 By [Signature]
11 Greg Wingard
Executive Director

12 II. ORDER AND DECREE

13 THIS MATTER came before the Court upon the Parties' Joint Motion for Entry of Consent
14 Decree and the foregoing Stipulations of the parties. Having considered the Stipulations and the
15 promises set forth below, the Court hereby ORDERS, ADJUDGES, and DECREES as follows:

- 16 1. This Court has jurisdiction over the parties and subject matter of this action.
- 17 2. Each signatory for the parties certifies for that party that he or she is authorized to
18 enter into the agreements set forth below.
- 19 3. This Consent Decree applies to and binds the parties and their successors and
20 assigns.
- 21 4. This Consent Decree and any injunctive relief ordered within applies to the
22 operation, oversight, or both by Ardagh of its Facility at 5801 E Marginal Way S, Seattle,
23 Washington 98134 (the "Facility"), which is subject to National Pollutant Discharge Elimination

1 System Permit No. WAR001134 (the “General Permit”) and Major Discharge Authorization
2 number 555-004 and 555-005 (the “Wastewater Authorization”) for wastewater discharges from
3 Ardagh’s Facility.

4 5. This Consent Decree is a full and complete settlement and release of all the claims
5 in the complaint, the sixty-day notice and all other claims known and unknown existing as of the
6 date of entry of this Consent Decree that could be asserted under the Clean Water Act, 33 U.S.C.
7 §§ 1251-1387, arising from operations of the Facility. These claims are released and dismissed
8 with prejudice. Enforcement of this Consent Decree is Soundkeeper and WAP’s exclusive remedy
9 for any violation of its terms.

10 6. This Consent Decree is a settlement of disputed facts and law. It is not an admission
11 or adjudication regarding any allegations by Soundkeeper and WAP in this case or of any fact or
12 conclusion of law related to those allegations, nor evidence of any wrongdoing or misconduct on
13 the part of Ardagh.

14 7. Ardagh agrees to the following terms and conditions in full and complete
15 satisfaction of all the claims covered by this decree:

16 a. Ardagh will comply fully with all conditions of its National Pollutant
17 Discharge Elimination System Permit No. WAR001134 and any successor, modified, or
18 replacement permit authorizing discharges of stormwater associated with industrial activity
19 from the Facility as well as Major Discharge Authorization number 555-004 and 555-005
20 any successor, modified, or replacement authorization for discharging wastewater from the
21 Facility.

22 b. For the duration of this Consent Decree, Ardagh shall, on a quarterly basis,
23 electronically forward to Soundkeeper copies of all communications to and/or from

1 Ecology related to its General Permit or stormwater discharges from the Facility (including
2 copies of documents submitted to Ecology electronically) as well as communications to
3 and/or from King County related to its Wastewater Authorization.

4 c. Ardagh has installed and is operating the stormwater treatment system
5 proposed in its May 15, 2020, Engineering Report, attached hereto as **Attachment A**
6 (Phase 1). Ardagh has applied for construction permits to conduct the construction and
7 install the treatment system proposed and selected in its June 29, 2020, Engineering Report,
8 attached hereto as **Attachment B** (Phase 2). Ardagh will install and have operational the
9 Phase 2 stormwater treatment system by no later than the Level 3 Deadline for completing
10 Phase 2 set for Ardagh by the Department of Ecology. Due to City of Seattle permitting
11 delays, Ardagh has applied to the Department of Ecology for an extension of the Level 3
12 Deadline to complete Phase 2 construction by June 30, 2022. Soundkeeper may provide
13 Ardagh with any comments and/or revisions to any updated Engineering Reports not later
14 than fourteen (14) days of receipt. Ardagh must consider comments and recommendations
15 submitted and either accept them and modify the report and implementation plan or justify
16 in writing any non-acceptance within fourteen (14) days. Disagreements shall be subject
17 to this Consent Decree's dispute resolution provisions. Within sixty (60) days of
18 completion of construction of each treatment system, Ardagh will update its stormwater
19 pollution prevention plan ("SWPPP") to reflect the new structure and practices.

20 d. Due to the delay in installation of the Phase 2 treatment system, beginning
21 immediately at execution of this Consent Decree, Ardagh will increase its visual
22 inspections of the facility to weekly until all treatment systems are installed and operations
23 to ensure adequate BMP implementation and effectiveness. As described in the SWPPP, if

1 a BMP is found to be inadequate or pollutant sources are not identified or accurately
2 described in the SWPPP during a routine visual inspection, the SWPPP and BMP
3 implementation will be updated accordingly. If track-out is observed at the facility during
4 a visual inspection, including from either end of Strategic Materials' operations, then
5 sweeping must be implemented immediately.

6 e. Within thirty (30) days of entry of this Consent Decree, Ardagh will reassess
7 its Source Assessment Report to identify potential operational and structural source control
8 best management practices (BMPs) that can be implemented to prevent contact between
9 pollutants and rainfall and runoff. This assessment will explicitly include additional source
10 control actions for Strategic Materials' operations within the Facility.

11 f. Within sixty (60) days of entry of this Consent Decree, Ardagh will submit
12 a BMP and Source Control assessment report ("Source Control Report") to Soundkeeper
13 and WAP that lists all potential BMPs identified, their locations, those selected for
14 implementation, whether they already have been implemented, and if not the
15 implementation schedule, and an explanation and justification for why the remainder were
16 not selected. This Source Control Report must include specific recommendations for
17 reducing dust from Strategic Materials' operations based on advice from a third-party air
18 pollution control expert. Strategic Materials' third party air pollution expert is SCS
19 Engineers, Environmental Consultants and Contractors. After Plaintiffs' review,
20 Soundkeeper and WAP may provide comments to Ardagh within fourteen (14) days.
21 Ardagh must consider comments and recommendations submitted and either accept them
22 and modify the Source Control report and implementation plan or justify in writing any
23 non-acceptance within thirty (30) days. Disagreements shall be subject to this Consent

1 Decree's dispute resolution provisions. Ardagh will implement the projects identified in
2 the Source Control report in accordance with the implementation schedule provided therein

3 g. Beginning immediately at execution of this Consent Decree, Ardagh will
4 increase sampling and analysis of stormwater runoff from each outfall for any treatment
5 systems described in the Engineering Reports (Attachments A and B) that have already
6 been installed (Phase 1) for parameters required in Tables 2, 3, and 6 of General Permit
7 (turbidity, pH, oil sheen, copper, zinc, TSS, and petroleum hydrocarbons). Ardagh will
8 collect at least one sample per month from each designated location (in accordance with
9 General Permit Condition S4. General Sampling Requirements) if sufficient flow occurs.
10 Samples required by this paragraph must be collected with no less than five days between
11 them. If a rain event sufficient to cause a discharge from the outfall does not occur in each
12 month, Ardagh will sample and analyze the stormwater runoff from the first such rain event
13 which occurs. Ardagh will provide the sample results to Soundkeeper and WAP quarterly
14 for six quarters.

15 h. Beginning immediately at execution of this Consent Decree, Ardagh will
16 increase sampling and analysis of stormwater runoff from each outfall at the facility that is
17 not treated by the Phase 1 treatment system for parameters required in Tables 2, 3, and 6
18 of General Permit (turbidity, pH, oil sheen, copper, zinc, TSS, and petroleum
19 hydrocarbons) and shall continue such sampling until the Phase 2 treatment system is
20 installed and is operational. Ardagh will collect at least one sample per month from each
21 outfall (in accordance with General Permit Condition S4. General Sampling Requirements)
22 if sufficient flow occurs. Samples required by this paragraph must be collected with no
23 less than five days between them. If a rain event sufficient to cause a discharge from the

1 outfall does not occur in each month, Ardagh will sample and analyze the stormwater
2 runoff from the first such rain event which occurs. Ardagh will provide the sample results
3 to Soundkeeper and WAP quarterly until new treatment systems are installed.

4 i. For each treatment system described in the Engineering Reports
5 (Attachments A and B) that starts operating following execution of this Consent Decree,
6 (Phase 2) beginning immediately after it becomes operational Ardagh will conduct
7 enhanced sampling and analysis of stormwater runoff from each treatment system outfall
8 for parameters required in Tables 2, 3, and 6 of General Permit (turbidity, pH, oil sheen,
9 copper, zinc, TSS, and petroleum hydrocarbons). Ardagh will collect at least one sample
10 per month from each designated location (in accordance with General Permit Condition
11 S4. General Sampling Requirements) if sufficient flow occurs. Samples required by this
12 paragraph must be collected with no less than five days between them. If a rain event
13 sufficient to cause a discharge from the outfall does not occur in each month, Ardagh will
14 sample and analyze the stormwater runoff from the first such rain event which occurs.
15 Ardagh will provide the sample results to Soundkeeper and WAP quarterly for six quarters.

16 j. If there have been no benchmark exceedances or violations of applicable
17 effluent limits set by the General Permit at a particular outfall for six quarters, then Ardagh
18 may revert to the monitoring frequencies required by the General Permit's Condition S4.
19 for that outfall rather than the enhanced frequency monitoring schedule described in the
20 subparagraph above.

21 k. If the average of monthly sampling results from a treatment system
22 described in the Engineering Reports (Attachments A and B) in any quarter, for any single
23 parameter, exceed benchmarks or applicable effluent limit at an outfall during the first year

1 of monitoring after installation and operation of the treatment system, Ardagh will conduct
2 an assessment, in consultation with its Engineering Consulting Firm, to evaluate the
3 treatment system's performance trend over the prior year. The assessment's objective will
4 be to determine whether adjustments can be made sufficient to meet all benchmarks or
5 applicable effluent limit. Ardagh will complete the assessment within thirteen (13) months
6 after completion of the treatment installation and will notify Soundkeeper and WAP of the
7 date when such assessment is completed. Within thirty (30) days of completion of the
8 assessment, Ardagh will submit an Action Plan to Soundkeeper and WAP. The Action
9 Plan will detail the assessment's methods, results, and conclusions, and outlining the
10 design, reconstruction, operational, and/or maintenance improvements or adjustments to
11 the stormwater management systems and SWPPP, including BMP implementation and
12 implementation of additional stormwater treatment, expected to increase the level of
13 performance sufficiently to meet benchmarks or applicable effluent limits, as well as
14 address whether further monitoring above the General Permit requirements should be
15 conducted or revert to General Permit requirements. After review, Soundkeeper and WAP
16 may submit comments within fourteen (14) days. Ardagh will consider comments and
17 recommendations submitted and either accept them and modify the revised Action Plan or
18 justify in writing any non-acceptance. Disagreements will be subject to the Consent
19 Decree's dispute resolution provisions. If Soundkeeper and WAP approves Ardagh's
20 Action Plan, Ardagh will fully implement the approved adjustments to its stormwater
21 treatment system within ninety (90) days of Soundkeeper and WAP's approval unless
22 capital expenditures are necessary. If implementation of the Action Plan requires a capital
23 expenditure, then within six months or, if the Action Plan cannot reasonably be

1 implemented within such time, twelve months. After implementation of adjustments to
2 Ardagh's stormwater treatment system, Ardagh will conduct enhanced sampling as
3 described in paragraph 7(h) above to collect three months of samples subject to repeating
4 the provisions of this paragraph if the average of the three monthly sampling results for
5 any single parameter exceed the benchmark or applicable effluent limit at an outfall.
6 Samples required by this paragraph must be collected with no less than five days between
7 them.

8 1. Ardagh will continue to monitor its discharge of fats, oils, and greases
9 ("FOG") to the county sewer system as required by its Wastewater Authorization.

10 m. If the levels of FOG and/or the maximum daily discharge volume exceed
11 limits set by Ardagh's Wastewater Authorization, Ardagh will report the exceedance to
12 King County in accordance with its Wastewater Authorization and provide the report to
13 Soundkeeper and WAP. If an exceedance of the maximum daily discharge volume is
14 attributable to water used for emergency cooling in response to a furnace's glass leak,
15 Ardagh will indicate as much in its notice to Soundkeeper and WAP. Should the level for
16 either parameter exceed limits set by Ardagh's Wastewater Authorization in three out of
17 four reporting periods, then Ardagh must submit to Soundkeeper and WAP an Action Plan
18 for source control or an improved treatment process for this wastewater stream within thirty
19 (30) days of the third exceedance that details actions Ardagh plans to take to address these
20 violations. An exceedance of the maximum daily volume due to a glass leak shall not be
21 counted in determining whether an Action Plan has been triggered provided that Ardagh
22 has complied with their O&M manual. Soundkeeper and WAP may submit comments
23 within fourteen (14) days. Ardagh will consider comments and recommendations

1 submitted and, within thirty (30) days of receipt of these comments either accept them and
2 modify the revised Action Plan or justify in writing any non-acceptance. Disagreements
3 will be subject to the Consent Decree's dispute resolution provisions and the parties will
4 use all best efforts to resolve them promptly. If Soundkeeper and WAP approve Ardagh's
5 Action Plan, Ardagh will fully implement the approved adjustments to its wastewater
6 system within ninety (90) days of Soundkeeper and WAP's approval, or if implementation
7 of the Action Plan requires a capital expenditure, then within six months, or if the Action
8 Plan cannot reasonably be implemented within such time, twelve months.

9 n. Ardagh will work with its qualified stormwater consultant to update its
10 SWPPP to reflect the additional BMPs required by this Consent Decree. Initial updates
11 will be completed no later than October 31, 2021. Ardagh will provide Soundkeeper and
12 WAP with an electronic copy of the SWPPP within thirty (30) days of the initial update
13 and any subsequent revisions during the term of this Consent Decree. Soundkeeper and
14 WAP may provide comments and/or proposed revisions to the revised SWPPP within thirty
15 (30) days. Ardagh will consider Soundkeeper and WAP's comments in good faith and
16 respond in writing within thirty (30) days. Ardagh will consider comments and
17 recommendations submitted and either accept them and modify the revised SWPPP or
18 justify in writing any non-acceptance.

19 o. Ardagh must coordinate with Soundkeeper and WAP an inspection of the
20 Facility at a mutually agreeable time in approximately one year and annually thereafter for
21 the duration of the Consent Decree.

22 p. Ardagh will be subject to a stipulated payment in lieu of penalty of \$5,580
23 for each month in which a parameter exceeds the effluent limits for discharges to impaired

1 waters set in Table 6 of the General Permit after entry of this Consent Decree. Ardagh will
 2 make any stipulated payments in lieu of penalty to Seattle Parks Foundation at the address
 3 provided in paragraph 8 below not later than thirty (30) days after becoming aware of such
 4 effluent limitation violation, with a cover letter explaining the payment, with a copy of the
 5 letter and check provided to WAP and Soundkeeper.

6 q. Not later than thirty (30) days after the entry of this Consent Decree by this
 7 Court, Ardagh will pay \$19,000 (NINETEEN THOUSAND DOLLARS) to cover the costs
 8 Soundkeeper's reasonable attorney and expert fees for monitoring of compliance with this
 9 consent decree. Payment will be made by check payable and mailed to Smith & Lowney,
 10 PLLC, 2317 East John St., Seattle, WA 98112, attn: Richard Smith. These funds will be
 11 kept in Smith and Lowney's trust account and any funds not spent will be returned to
 12 Ardagh at the termination of the consent decree with an accounting of the costs and fees
 13 incurred for monitoring compliance with this Consent Decree.

14 8. Not later than thirty (30) days after the entry of this Consent Decree by this Court,
 15 Ardagh will pay \$400,000 (FOUR HUNDRED THOUSAND DOLLARS) to Seattle Parks
 16 Foundation for the Gateway Park Project, as described in **Attachment C** to this Consent Decree.
 17 The check will be made to the order of Seattle Parks Foundation and delivered to: Seattle Parks
 18 Foundation, Michelle Benetua, 105 South Main Street #235, Seattle WA 98104. Payment will
 19 include the following reference in a cover letter or on the check: "Consent Decree, Soundkeeper
 20 et al. v. Ardagh, Case No. 2:17-cv-00284-TSZ." A copy of the check and cover letter, if any, will
 21 be sent simultaneously to Soundkeeper, WAP, and their counsel.

22 9. Within thirty (30) days of entry of this Consent Decree by the Court, Ardagh will
 23 pay \$195,000 (ONE HUNDRED AND NINETY-FIVE THOUSAND DOLLARS) dollars to cover

1 Soundkeeper and WAP's litigation fees, expenses, and costs (including reasonable attorney and
 2 expert witness fees) by check payable and mailed to Smith & Lowney, PLLC, 2317 East John St.,
 3 Seattle, WA 98112, attn: Richard Smith. Ardagh's payment will be in full and complete
 4 satisfaction of any claims Soundkeeper and/or WAP has or may have, either legal or equitable,
 5 and of any kind or nature whatsoever, for fees, expenses, and costs incurred in the Litigation.

6 10. A force majeure event is any event outside the reasonable control of Ardagh that
 7 causes a delay in performing tasks required by this decree that cannot be cured by due diligence.
 8 Delay in performance of a task required by this decree caused by a force majeure event is not a
 9 failure to comply with the terms of this decree, provided that Ardagh timely notifies Soundkeeper
 10 and WAP of the event as required by this paragraph; the steps that Ardagh will take to perform the
 11 task; the projected time that will be needed to complete the task; and the measures that have been
 12 taken or will be taken to prevent or minimize any impacts to stormwater quality resulting from
 13 delay in completing the task. Ardagh will notify Soundkeeper and WAP of the occurrence of a
 14 force majeure event as soon as reasonably possible but, in any case, no later than fifteen (15) days
 15 after Ardagh becomes aware of the event. In such event, the time for performance of the task will
 16 be extended for a reasonable period of time following the force majeure event.

17 By way of example and not limitation, force majeure events include:

- 18 a. Acts of God, war, insurrection, or civil disturbance;
- 19 b. Earthquakes, landslides, fire, floods;
- 20 c. Actions or inactions of third parties over which defendant has no control;
- 21 d. Unusually adverse weather conditions;
- 22 e. Restraint by court order or order of public authority;
- 23 f. Strikes;

1 g. Any permit or other approval sought by Ardagh from a government
2 authority to implement any of the actions required by this Consent Decree
3 where such approval is not granted or is delayed, and where Ardagh has
4 timely and in good faith sought the permit or approval; and

5 h. Litigation, arbitration, or mediation that causes delay.

6 11. This Court retains jurisdiction over this matter. While this Consent Decree remains
7 in force, this case may be reopened without filing fee so that the parties may apply to the Court for
8 any further order that may be necessary to enforce compliance with this decree or to resolve any
9 dispute regarding the terms or conditions of this Consent Decree. In the event of a dispute
10 regarding implementation of, or compliance with, this Consent Decree, the parties must first
11 attempt to resolve the dispute by meeting to discuss the dispute and any suggested measures for
12 resolving the dispute. Such a meeting should be held as soon as practical, but must be held within
13 thirty (30) days after notice of a request for such a meeting to the other party and its counsel of
14 record. If no resolution is reached at that meeting or within thirty (30) days of the notice, either
15 party may file a motion with this Court to resolve the dispute, with the dispute to be decided based
16 upon the requirements of the General Permit and the Clean Water Act. The provisions of section
17 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), regarding awards of costs of litigation
18 (including reasonable attorney and expert witness fees) to any prevailing or substantially
19 prevailing party, will apply to any proceedings seeking to enforce the terms and conditions of this
20 Consent Decree.

21 12. The parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), no consent judgment
22 can be entered in a Clean Water Act suit in which the United States is not a party prior to forty-
23 five (45) days following the receipt of a copy of the proposed consent judgment by the U.S.

1 Attorney General and the Administrator of the U.S. EPA. After the filing of this proposed
2 Consent Decree by the parties, Soundkeeper and WAP served copies of it upon the
3 Administration of the U.S. EPA and the Attorney General, with a copy to Ardagh. The United
4 State has reviewed the consent degree and the Court has been notified that there is no objection to
5 the filing of this Consent Decree.

6 13. This Consent Decree will take effect upon entry by this Court. It terminates three
7 years after that date, or upon completion of all obligations imposed by this Consent Decree,
8 whichever is later.

9 14. Both parties have participated in drafting this Consent Decree.

10 15. This Consent Decree may be modified only upon the approval of the Court.

11 16. Notifications required by this Consent Decree must be in writing by email. For a
12 notice or other communication regarding this decree to be valid, it must be delivered to the email
13 addresses listed below or to any other address designated by the receiving party in a notice in
14 accordance with this paragraph 16.

15
16
17 Puget Soundkeeper Alliance
18 Attn: Katelyn Kinn
19 Email: katelyn@pugetsoundkeeper.org

20 Waste Action Project
21 Attn: Greg Wingard
22 Email: gwingard@earthlink.net

23 Notifications or copies required by this Consent Decree to be made to Defendant shall be
delivered electronically to:

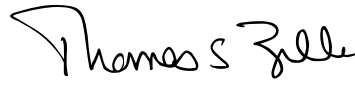
1 Ardagh Glass Inc.
Attn: Joshua Markus
2 Email: joshua.markus@ardaghgroup.com

3 Ardagh Glass Inc.
Attn: Richard Tomicek
4 Email: richard.tomicek@ardaghgroup.com

5 Nossaman LLP
Attn: Svend Brandt-Erichsen
6 Email: sbrandterichsen@nossaman.com

7 A notice or other communication regarding this Consent Decree will be effective when
8 received unless the notice or other communication is received after 5:00 p.m. on a business day,
9 or on a day that is not a business day, then the notice will be deemed received at 9:00 a.m. on the
10 next business day.

11
12 DATED this 10th day of September, 2021.

13 

14

HON. THOMAS S. ZILLY
15 UNITED STATES DISTRICT JUDGE

16 Presented by:
SMITH & LOWNEY, PLLC

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s/Meredith A. Crafton
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